

**REPORT OF THE TECHNICAL COMMITTEE  
OF LEGAL EXPERTS ON THE LAND ACT. NO. 4 OF 1999**

**DAR ES SALAAM**

**JULY 2003**

**Mrs. Salome Sijaona  
Permanent Secretary  
Ministry of Lands and Human  
Settlement Development,  
P.O. Box 9132,  
Dar es Salaam**

Date: 18<sup>th</sup> July 2003

**Elvis Musiba,  
Chairman,  
Tanzania Private Sector Foundation,  
P.O. Box 11313,  
Dar es Salaam.**

Dear Sir/Madam,

**RE: REPORT OF THE TECHNICAL COMMITTEE OF LEGAL  
EXPERTS ON THE LAND ACT NO. 4 OF 1999.**

You will recall that the Stakeholders Consultative Meeting convened on 28<sup>th</sup> October 2002 and co-chaired by yourselves for the purpose of exchanging views on the Land Act, 1999, resolved to appoint a Committee of Legal Experts to review the concerns raised at the Meeting.

The Committee has now finalized its work. It is my pleasure to submit to you its Report.

You will note that the Report could have been submitted earlier. We have assigned reasons for that in the body of the Report itself as part of the limitations faced. We still believe that the quality of the report has not been compromised and will be useful in the exercise of reviewing Land Act 1999.

Enclosed herewith is the report for your consideration

**Thank you**

**P.C. Bakilana  
CHAIRMAN  
TECHNICAL COMMITTEE OF LEGAL EXPERTS**

**CC. Chairman, Tanzania Bankers Association**

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## ABREVIATIONS

1. TCLE or “Committee” : Technical Committee of Legal Experts
2. TBA : Tanzania Bankers Associations
3. MLHS : Ministry of Lands Housing and Settlement
4. TOR : Terms of Reference
5. TPSF : Tanzania Private Sector Foundation
6. NLP : National Land Policy, 1995
7. Act : The Land Act No. 4 of 1999

# REPORT OF THE COMMITTEE OF LEGAL EXPERTS ON THE LAND ACT

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## PART 1: INTRODUCTION

### 1.1. Background

Soon after the enactment of the Land Act, [No. 4 of 1999] in February 1999, the Tanzania Bankers Association (TBA) on behalf of its members raised concerns regarding certain provisions of Act especially those relating to mortgages. The concern were consolidated in form of a Position Paper that was later on submitted to the Government through the Governor of the Bank of Tanzania for consideration.

After the Act became operational on the 1<sup>st</sup> of May 2001, different groups including the Tanganyika Law Society, the Confederation of Tanzania Industries, Tanzania Private Sector Foundation and investors joined hands with TBA in pointing out certain shortcomings they had identified in the Act. In time Government responded by convening a Stakeholders Consultative Meeting for the purpose of exchanging views on perceived shortcomings in the Act. That Meeting was held at the Court Yard Hotel on 28<sup>th</sup> October 2002. It was convened by the Ministry of Lands and hosted jointly by the TBA and the Tanzania Private Sector Foundation. TPSF At its conclusion, Stakeholders agreed that there were genuine issues of concern raised by TBA. Nonetheless, the TBA Position Paper was found not comprehensive on the shortcomings and stakeholders listed additional issues.

It was then resolved that a Committee of thirteen legal experts representing all groups of stakeholders be constituted and charged with the task of reviewing the concerns raised at the Meeting. The Team of Experts deputed is set out at **Appendix 3**. The Committee was given specific Terms of Reference and a timeframe and was directed to report its findings back to the plenary. This Report therefore is the outcome of the findings and consensus reached by the Team of Legal Experts.

### 1.2. Objective

The objective of this Report is: therefore: -

- (a) to report on assessment of the provisions of the Land Act relating to mortgages within the context of empowering public access to credit.
- (b) on reconciliation of the various positions taken by stakeholders.
- (c) Is offer draft and recommend on alternative provisions of the Land Act, 1999 for consideration by the stakeholders
- (d) to offer recommendation considered relevant.

### 1.3. Terms of reference (TOR)

- (a) The Technical Committee of Legal Experts (TCLE) was empowered to elect its own chairperson from among its members.
- (b) To review the provisions of the Land Act, 1999 on the basis of the matrix produced from the joint analysis by the TBA and the MLHS.
- (c) Come up with specific recommendations for consideration by the stakeholders before the same were to be submitted to the Government.
- (d) Produce a report within two weeks and present the same to the plenary in the form of (c) above.

A list the TOR is appended to this Report as **Appendix 2**

### 1.4. Methodology

The Committee's Terms of Reference [ToR] guided its work. Mr. Peter C. Bakilana, a lawyer and former Commissioner for Lands was elected chairperson of the Committee from among its members. As to it's of work the Committee, employed two methods to achieve its objectives:

- (i) Utilisation of Committee members' experience including use of precedent in use by various institutions in relation to any aspect under discussion e.g. mortgage instruments, Land Office forms, etc.
- (ii) Round table discussion of the various provisions of the law taking Land Act sections one by one until a consensus on the issue was reached or majority opinion agreed upon. Once consensus had been reached or agreed, a Committee member would be deputed to draft in appropriate language the position to be recommended. For ease of reference most relevant section of the Land Act are set out in **Appendix 4**
- (iii) Review of related legislation impact on the Land Act.
- (iv) Collective review of draft provisions and proposals and their adoption.

### 1.5. Limitations

Although the Tanzania Private Sector Foundation (TPSF) commendably hosted the Committee's meeting, the work of the Committee was hampered by intermittent attendance. Low attendance might have been attributed by absence of remuneration especially for private sector lawyers to whom every minute counts as they have bills to pay. Low attendance resulted in loss of time and therefore delay. The Committee feels that time lost might be compensated for by the product. Never the less, the work of the Committee progressed well: even where a consensus was not reached, diverse opinions were heard, and discussed and agreed.

## PART 11: PROVISIONS OF THE ACT THAT REQUIRE ATTENTION

### 2.1. Land as Valuable Property

- 2.1.1. Sections 3(1)(g) and (f) 19(2), 20(3), 31, 33, 37(8), 52, 112 and 131 of the Land Act deal with the concept of value of land within the context of a market economy.
- 2.1.2. The Land Act [the Act] which came into force in 1<sup>st</sup> May 2001, was enacted specifically to translate and implement the National Land Policy of 1995 [NLP]. The NLP is a comprehensive policy pronouncement regarding land tenure, management and administration. The overall objectives of the policy are *inter alia*, to promote and ensure existence of a secure land tenure system in Tanzania and to sustainably to foster optimal use of land. Ideally, the policy aims at promoting both equitable distribution of land and access to it by all its people.
- 2.1.3. Consequently, Section 3 of the Act enshrines these policy objectives with provisions specially categorized as “Fundamental Principles of the National Land Policy”

### 2.2. Inconsistency between The Land Act the National Land Policy

- 2.2.1. Despite the positive policy statements enunciated under item 4.2.17 and 4.2.18 of the NLP that “land has value”, the Act provides to the company, that “*bare land has no value except for un-exhausted improvements*”.  
Most notable in this regard is Section 37(8)(9) which reads;
- “S.37 (8) Unless otherwise provided by this Act, no sale of land without un-exhausted improvements shall be approved and such land is deemed to have no value”
- 2.2.2. In addition, S.37 (9) provides that “any disposition in contravention of sub-section (8) of at section shall be *void ab initio*.”
- 2.2.3. It is obvious that the Act has in implementing the National Land Policy has restricted the concept that bare land has value to specified purposes or transactions. The most notable provisions/purposes or transactions where value would be serviced to land are the following:

SECTION	PURPOSE/TRANSACTION
31	Premium for purposes of grant of a might of company
33	Land Rent.
34(4)	Taxes and dues on disposition
52	Auction and Tender
112	Mortgages
132	Sale of mortgage

2.2.4. The apparently conflicting provisions in the Act make no sense at all. In effect, they constitute a hindrance to a landholder using his land as capital and instrument for investment.

- Recommendations:**
- (i) It is recommended therefore that, the law should explicitly recognize and pronounce that bare land has value.
  - (ii) Monetization of Land once recognized as such, should not be restricted.

- Justification:**
- (i) Ideally, the Act as translator and implementer of the NLP, should/ought not to be in contradiction with the same.
  - (ii) change will curb corrupt practices among dealers in land or landed property as is the case at the moment.
  - (iii) change will simplify the process of disposition of bare land which is essential in joint venture ownership and mortgage arrangement.
  - (iv) recognition of land as having value is a *sine qua non* for a realistic review of the Act currently being undertaken.

### 2.3. Ownership of Land by non-nationals

Sections 19, 20 and 25

**2.3.1.** In these sections of the Land Act, the law restricts ownership of land by non-nationals to holding for investment purposes only where under such investors acquire derivative rights.

**Recommendation:** The Committee is of the view that the provisions should not be reviewed at this point in time as the law provides for a procedure to be followed by foreigners who wish to have access to land for investment purpose. Should there be a need to change the law on this aspect, the matter should be deliberated at policy makers level. At policy makers level.

**2.3.2.** The Committee is of the firm view that non-nationals ownership of land should continue to be regulated.

## 2.4. Retrospective Effect of the Act

### Section 111(1)

Provides that this part applies to all mortgages of land or interests on land, made or coming into effect before on and after the coming into operation of this act .....

**Shortcomings:** The Act should not operate retroactively as it will affect the rights of the parties to contracts already entered into and are either (1) wholly performed by one of the parties on the basis of the previous legal regime, or (2) not yet performed. In addition, retrospective application of laws may be violation of the Constitution.

**Recommendation:** The words “before on and” appearing on Section 111(1) should be deleted

## 2.5. Creation of Mortgage

### Section 112(1)

An occupier of land under a Right of Occupancy and a lessee may, by an instrument in the prescribed form, mortgage his interest in the land or part thereof to secure the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfilment condition.

**Shortcomings:**

- (i) The Act has prescribed a form that has to be adhered to in an otherwise typical contractual arrangement. The prescriptive nature inherent in the above-cited provision infringes the cardinal rule of freedom to contract.
- (ii) Inclusion of “contingent debt” and “money or money’s worth” creates uncertainties and vague interpretation.

**Recommendation:** It is necessary therefore to streamline the provision by avoiding prescriptive terminology and uncertainty.

Section 112(1) should read: “An occupier of land under a right of occupancy and a Lessee may by a mortgage *instrument*; mortgage his interest in the land or part thereof to secure the payment of debt or *fulfilment of a condition*.”

## 2.6. Mortgage of a matrimonial home and spousal consent:

### Section 112(3)

A mortgage of a matrimonial home, including a customary mortgage of a matrimonial home shall be valid only if: -

- (a) Any document or form used in applying for such a mortgage is signed by or there is evidence from the document that it has been assented to by the borrower and any spouse of the borrower living in that matrimonial home;
- (b) Any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the borrower living in that matrimonial home.

### Shortcomings:

- (i) Identity of spouse is difficult to ascertain.
- (ii) Existence or non-existence of spouse difficult to prove.
- (iii) Property subject of mortgage might be matrimonial property, not matrimonial home;
- (iv) Spousal right to participate in mortgage arrangements might be encumbered by marriage interactions for the mortgage to view

### Recommendation:

The Committee reviewed several options including the requirement of a 'caveat' to be filed by a spouse in order to protect their interests in a matrimonial home. Nonetheless, the Committee could not identify and therefore be in a position to recommend a specific solution to the shortcomings observed. It was thus agreed that, the item be left to banking practice and court interpretation.

## 2.7. Customary and Small Mortgage Section 113 (2)

Where the lender under a customary mortgage seeks to exercise any customary remedy which involves or may involve the borrower being disposed or permanently deprived of the occupation of the mortgaged land, the lender shall, after using the services to the Village Land Council try and mediate on the application of the proposed or any other remedy, make an application to the Village Land Council for an order authorizing the exercise of that remedy and the Village Land Council shall, in determining whether to authorize the exercise of that remedy be guided by the provisions of sections 138 and 140 applying to small mortgages, whether the amount of the loan under the customary mortgage exceeds the amount that may be lent on a small mortgage or not.

- Shortcomings:**
- (i) The remedies available to the borrower Override the basic principles of a mortgage contract.
  - (ii) The parties are, in any case, entitled to refer their dispute to a Court of Law for resolution.
  - (iii) The section, prescriptive as it is, compels the parties to go to Court under any circumstances!

The powers of the Village Land Councils are such that the councils are bestowed with authority to manage the mortgage/mortgagee relationship with the resultant effect that any terms and conditions contained in the mortgage instrument have been rendered invalid.

**Recommendations:** The section should be amended to provide relief without overriding mortgage terms as proposed for sections 138 and 140 below. The section be re-phrased as follows:

“Section 113(2) When the Mortgagee seeks to exercise any remedy on the mortgage created under sub section 1, the Mortgagee shall serve the Mortgagor an additional one month notice in pursuance to the provisions of section 138.”

**Justification:**

The exercise of remedies under a mortgage should be left to operate subject to the terms and conditions contained in the Mortgage Instrument.

### **Section 113(3)**

The Borrower under a customary mortgage may, after making use of the services of the Village Land Council to try and mediate on the matter with the lender, apply to a Tribunal for the mortgage to be reopened on the ground that the terms of the mortgage are-

- (a) Unfair; or
- (b) An unreasonable departure from the normal terms of a customary mortgage applicable in the area where the land is located; or
- (c) Disadvantageous to the interests of the dependants of the borrower, and the Tribunal shall, in considering and determining that application, be guided by the provisions of sections 141 and 142.

**Shortcomings:** Owing to the proposal for amendment of Section 113(2) above, subsection (3) will become redundant.

**Recommendations:**

If Section 113(2) is amended as proposed then this section is rendered redundant as there will not be need to use the service of the Tribunal. As such, the section should be deleted. In addition, proposals are made below to delete both sections 141 and 142.

**2.8. Small Mortgages**

**Section 114**

- (1) In this Act, a ‘small mortgage’ is a mortgage for a period not exceeding three years to secure any sum of money not exceeding the sum set out in subsection (2) or which shall from time to time be set by order made by the Minister, after consultation with: -
  - (a) The Commissioner;
  - (b) Any body or organization whose principal business is to advance or to represent those organizations whose principal business is to advance money on the security of a mortgage.
- (2) The sum of money which may be secured by a small mortgage shall not, unless and until it is altered by order made by the Minister in accordance with subsection (1), be greater than half a million shillings.
- (3) A small mortgage instrument and any other document which is ancillary to, or is to be used by the lender to inform the borrower of all the rights and obligations of the parties to, a small mortgage shall be in such a language and use such clear and simple words, typography and lay out that the borrower is made fully aware:-
  - (a) Of the right and duties conferred or imposed on him by the mortgage or any document ancillary to the mortgage;
  - (b) Of the protection and remedies available to him under this Act and any other law applicable to small mortgages;
  - (c) Such other matters as may be prescribed.
- (4) It shall be the duty of the lender of monies secured by a small mortgage to give to the borrower and, where the borrower is married, the spouse or spouses of the borrower and any other person who undertakes any obligation under that small mortgage a copy of the mortgage instrument prepared in accordance with the provisions of subsection (3).
- (5) If it appears to the court on an application to it under sections 138 to 142 that the small mortgage does not comply in every particular with the provisions of subsections (3) and (4) and any regulations made under this section which deal with the matters contained in those subsections, the court shall refuse to make the order applied for unless it appears to the court that:

- (a) Every person to whom subsection (4) refers received, before the creation of the small mortgage, as full an explanation of the consequences of that mortgage as if those subsections had been complied with; or
  - (b) There are exceptional circumstances which provide a satisfactory explanation of the failure to comply with those subsections.
- (6) Any advance of money which purports to be under a small mortgage but which exceeds the maximum sum of money which may, under subsection (2) or any order made by the Minister under subsection (1), from time to time be advanced under a small mortgage shall cease to be a small mortgage.
  - (7) Any provision, term, covenant or condition in a small mortgage which purports to exclude any provision of this Act which specifically applies to a small mortgage shall be void.
  - (8) The Minister may make regulations as to the form, content and layout of small mortgages and where such regulations set out model form complying with subsection (3) which may be used to create a small mortgage any person or organization advancing money on a small mortgage shall be under a duty to use documents in connection with their small mortgage no less clear and comprehensive than that model form.

**Shortcomings:**

- (i) The Act should not provide two sets of mortgage instruments since in doing so room for misinterpretation and problems in enforcement of the mortgage may occur.
- (ii) The duty to explain the rights and duties of the mortgagor should be clear but not onerous to mortgagee.
- (iii) The principle of freedom to contract should not be abolished by legislation.

**Recommendations:**

Section 114(1) and (2) should be retained as it defines small mortgage.

Section 114(3) should be amended, as there could be no separate or hybrid mortgage instrument. It means therefore that the same Mortgage instrument used will be used. A new section 114(3) should be enacted thus: **“It shall be the duty of the Mortgagee to explain to the Mortgagor the rights and duties conferred or imposed on such a Mortgagor by the mortgage or any other document ancillary to the mortgage”**.

Section 114(4) should be amended by deleting the words “and any other person who undertakes any obligation under that small mortgage”. In addition, words “prepared in accordance with the provisions of subsection (3) “should also be deleted”.

Section 114(5) should be deleted so as to be in line with proposals made in section 138 below.

Section 114(8) should be deleted as it infringes the sanctity of contracts. More over, the proposed section 114(2) cures the mischief of educating the unsophisticated borrower.

## **2.9. Remedies in Connection with Small Mortgages**

### **Section 138**

- (1) Where, in any case a borrower under a small mortgage remains in default after the end of the period set out in any notice served on that borrower by the lender under section 125, and the lender, at the end of that period, decided to exercise any of the remedies provided for under sections 127 to 133, the lender may proceed only by making an application to a court for an order authorizing him to exercise the remedy or remedies applied for.
- (2) Where a lender makes an application to a court under subsection (1), he shall serve a notice in the prescribed form on-
  - (a) the borrower;
  - (b) any spouse of the borrower;
  - (c) any person with whom the borrower jointly mortgaged the land to the lender;
  - (d) any person with a prior mortgage or encumbrance on the mortgaged land of whom he has actual notice, informing those person of the application and the remedy being applied for.
- (3) In determining whether to authorize the remedy, a court shall comply with the provisions of sections 140 and 141.
- (4) A lender shall take no action in connection with any remedy or otherwise against the borrower unless the court has issued an order authorizing the exercise of the remedy applied for.

### **Shortcomings:**

The shortcomings identified in Section 113(2) are applicable to this section as well. In addition, parties to a mortgage should not be compelled to go to Court as a matter of Law. The Section empowers the Court to administer duties and rights of the parties that should have been left to the parties themselves.

**Recommendations:**

- (i) 138(1) delete the words “by making an application to a court for an order authorizing him to exercise the remedy or remedies applied for”. The deleted words should be replaced thus: “after serving an additional one month notice”.
- (ii) 138(2) delete the words “**makes an application to a court**” and replace them with “**serve the additional one month notice**”
- (iii) 138(3) should be deleted as consequential to proposals above.
- (iv) 138(4) delete words “**the court has issued an order authorizing the exercise of the remedy applied for**” and replace with words “**the notice issued under subsection 1 has expired.**”

**2.10. Powers of the Court**

**Section 140**

1. In considering whether to make an order under section 138 authorizing a lender to exercise any remedy referred to in paragraphs (a) or (c) of subsection (3) of section 125 in respect of a small mortgage or to grant relief against any of the remedies of the lender in relation to a mortgage, other than a small mortgage in respect of which an application for relief has been made, a court-
  - (a) Shall, where the mortgaged land consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of or lease the land or a part therefore, have regard to whether the remedy which the lender proposes to exercise is reasonably necessary to prevent any or any further reduction in the value of the mortgaged land or to reverse any such reduction as has already occurred;
  - (b) Shall, where the mortgaged land consists or includes a dwelling-house, and the remedy proposed is to appoint a receiver, or take possession or lease the dwelling house or a part of it, have regard to the effect that the appointment of a receiver or the taking of possession or leasing the whole or a part of the dwelling house would have on the occupation of the dwelling house by the borrower and his dependants and if the effect would be to impose undue disturbance on those occupiers, whether it is satisfied that-

- (i) The lender has made all reasonable efforts, including the use of other remedies available to him, to induce the borrower to comply with his obligations under the mortgage; and
  - (ii) the borrower has persistently been in default of his obligations under the mortgage; and
  - (iii) where the sale is of land held for a customary right of occupancy, the lender has had regard to the age, means, and circumstance including the health and number of dependants of the borrower, and in particular whether-
    - (aa) the borrower will be rendered landless or homeless;
    - (bb) The borrower will have any alternative means of providing for himself and his dependants;
  - (iv) It is necessary to sell the mortgaged land in order to enable the lender to recover the moneys owing to him under the mortgage;
  - (v) in all the circumstances, it is reasonable to approve, or as the case may be, to make the order to sell the mortgaged land.
- (2) A court may refuse to authorize an order or may grant any relief against the operation of a remedy which the circumstances of the case require and without limiting the generality of those powers, may-
- (a) Cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;
  - (b) Extend the period of time for compliance by the borrower with a notice served under section 125;
  - (c) Substitute a different remedy or the one applied for or proposed by the lender or a different time for taking or desisting from taking any action specified by the lender in a notice served under section 113;
  - (d) Authorize or approve the remedy applied for or proposed by the lender, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that:-
    - (i) The borrower or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and
    - (ii) No injustice will be done by authorizing or approving the remedy, and may authorize or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the court thinks fit.
- (2) Where under the terms of a mortgage, the borrower is entitled or is to be permitted to pay the principal sum secured by the mortgage by instalments

or otherwise to defer payment of it in whole or in part but provision is also made in the mortgage instrument or any collateral agreement for earlier payment of the whole sum in the event of any default by the borrower or of a demand by the lender or otherwise, then for purposes of this section the court may treat as due under the mortgage in respect of the principal sum secured and of interest on it only the amounts which the borrower would have expected to be required to pay if there has been no such provision for earlier payment.

- (4) A court must refuse to authorize or approve a remedy if it appears to the court that-
  - (a) The default in issue has been remedied;
  - (b) The threat to the security has been removed;
  - (c) The borrower has taken the steps which he was required to take by the notice served on him under section 125;
  - (d) The lender has taken or attempted to take some action against the borrower in contravention of subsection (4) of section 138.

### **Section 141**

- (1) The court may reopen
  - (a) A small mortgage; or
  - (b) A mortgage for a sum equal to or less than the amount that may be lent on the security of a small mortgage; or
  - (c) A mortgage of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties.
- (2) The Court may reopen a mortgage to which subsection (1) refers if it appears to the Court-
  - (a) That principles of fair dealing were contravened when the terms of the mortgage were agreed to;
  - (b) That the effect of the terms of the mortgage, at the time when the question of reopening it arises, is to give the lender rights substantially greater than or different from those necessary to ensure that the mortgaged land provides adequate security for the principal sum advanced on the security of that land;
  - (c) That the mortgage requires payments to be made that are exorbitant or illegal, whether such payments are of interest or capital or both or otherwise and whether such payments are required to be made unconditionally or otherwise;
  - (d) That the mortgage includes a term which postpones that right to discharge the mortgage or otherwise impedes the discharge of the mortgage which appears to contravene the provisions of subsection (1) of section 116;
  - (e) That the mortgage imposes terms on the borrower that are significantly disadvantageous to the borrower compared to terms imposed on other borrowers in respect of similar mortgages and that these terms have been imposed solely or mainly because of the gender of the borrower.

## Section 142

- (1) The Court may exercise the powers conferred on it by section 141 either-
  - (a) On an application made to it for that purpose by either the borrower or the lender;  
or
  - (b) On an application by the lender:-
    - (i) To enforce the mortgage; or
    - (ii) To commence an action under section 126; or
    - (iii) To obtain an order authorizing the exercise of a remedy in connection with a default by the borrower under a small mortgage; or
  - (c) On an application by the borrower for relief against the exercise by the lender of any remedy in connection with a default by the borrower under a mortgage;
  - (d) By the Commissioner in respect
    - (i) Mortgages provided by one or more specific lenders where there is prima facie evidence of a pattern of unfair dealing and practices by the lender or those lenders; or
    - (ii) A lender, being a corporate body, which appears to exercise discrimination against borrowers on account of their gender, whether by granting mortgages on terms to which paragraph (e) of subsection (2) of section 141 applies, or by refusing to grant mortgages to persons on account of their gender except that a lender, being a corporate body which is implementing any programme, approved or assisted by the Government, designed to assist women to improve their economic and social position by providing them with advances secured by a mortgage of land shall not be taken to be acting in discriminatory manner if the advances under that programme are made only to women.
- (2) In reopening the mortgage, the court may-
  - (a) Direct that the mortgage shall have effect subject to modifications which the court shall order;
  - (b) Require the lender to repay the whole or part of any sum paid under the mortgage or any related or collateral agreement by the borrower or any guarantor or other person who assumed an obligation under the mortgage whether it is paid to the lender or any other person;
  - (c) Require the lender to pay any compensation to the borrower which the court shall think fit;
  - (d) Direct the lender, being a corporate body to cease acting in a discriminatory manner with respect to the granting of mortgages.
- (3) In considering whether to exercise the powers conferred it by this section, the court shall have regard to-
  - (a) Where the borrower is an individual, the age, gender, experience, understanding of commercial transaction, and health of the borrower at the time when the mortgage was created.

- (b) The financial standing and resources of the borrower relative to those of the lender at the time of the creation of the mortgage;
- (c) The degree to which, at the time of the creation of the mortgage, the borrower was under financial pressure and the nature of that pressure;
- (d) The interest rates prevailing at the time of the creation of the mortgage and during the continuation of the mortgage and the relationship of those interest rates to the interest rate applying from time to time in the mortgage;
- (e) The degree of risk accepted by the lender, having regard to the value of the mortgaged land and the financial standing and other resources of the borrower;
- (f) The importance of not undermining the confidence of reputable lenders in the market for mortgages;
- (g) Any other factors which the court considers relevant.

**Shortcomings:**

The Sections are repugnant to other laws, which provide for procedures of enforcing mortgages. In particular, the law is in clear contradiction of Order XXXII of the Civil Procedure Code, 1966 relating to enforcement of mortgages. In addition, the sections almost bestow powers onto Courts to grant discretionary orders without prescribing specific parameters. In any case, Courts have inherent jurisdiction of adjudicating disputes referred to them by the parties.

**Recommendations:**

These sections should be deleted in whole as they purport to grant powers to the court to revise the terms of contract which may have already been performed by one or both parties. Enforcement of mortgages is covered by the CPC.

**2.11. Variation of Interest Rates on Mortgages**

Section 119 “The rate of interest payable under a mortgage may be reduced or increased by a notice served on the borrower by the lender which shall:

- (a) Give the borrower a written notice of not less than thirty days of the reduction or increase in the rate of interest;
- (b) State clearly and in a manner, which can be readily understood, the new rate of interest to be paid in respect of the mortgage”.

**Shortcomings:**

- (i) The requirement for prior notification to the borrower is impracticable given both, the nature and tenure of mortgages.

- (ii) It is imperative that rates of interest be left out from mortgage document instead be covered by the loan document. Such document would peg the rate of interest on a mortgage to a predetermined economic indicator such as yield in treasury bills/bonds or the London Inter-bank Offered Rate (LIBOR)

**Recommendations:**

In classical mortgage arrangement, such notice may be impracticable. Mortgages are usually of a long term and the rate of interest is usually pegged on a certain economic indicator such as yield in treasury bills or bonds. As such, it may not be practicable to communicate to the mortgagor every time there is change in the yield. Rate of interest is usually provided for in the loan documents. The Loan Agreement usually spells out the rate of interest and how the same may be changed.

It is therefore recommended that Section 119 (1) be deleted altogether for the reasons given.  
**Remedy to be provided for under the Banking of Financial Institutions Act [2003]**

## 2.12. Discharge of Mortgages

### Section 120 (2)

“The Lender may provide in the mortgage instrument that where a borrower wishes to exercise his right to discharge the mortgage at any time before the expiry of the term of the mortgage: **shall be at liberty to do so.**

- (a) He shall give one month’s notice of his intention to discharge ;or
- (b) He shall pay not more than one month’s interest at the rate at which the interest is payable on the principal sum secured by the mortgage or at any lesser rate which may be agreed, as well as paying all other monies secured by the mortgage.”

**Shortcomings:**

The requirement under Section 120 (2) does not make commercial or practical sense either to the borrower or the lender because when the borrower has repaid the liability his immediate desire will be to discharge the mortgage. On the other hand, the lender has no interest to delay the discharge.

**Recommendations:**

There are cases where the Borrower wishes to discharge the mortgage after paying all the Borrower has already paid his liabilities (which includes principal and interest up to a predetermined date) or has entered into agreement with another Lender to take on the liabilities (which include principal and interest up to a predetermined date).

In the first case, the Lender would have no interest in retaining the security after the Borrower having discharged his obligations to him. In the second case, the 1<sup>st</sup> Lender would require an arrangement where he must first be paid by the 2<sup>nd</sup> Lender in exchange for executed discharge documents and title deed(s). This would enable the parties to simultaneously discharge the mortgage in favour of the 1<sup>st</sup> Lender and register a mortgage in favour of themselves the 2<sup>nd</sup> Lender.

It is for this reason it is recommended that, **subparagraph (a) and (b) in Section 120 (2)** be deleted since the requirement for the borrower to provide the lender with one's month notice prior to discharge or pay a months interest in lieu thereof does not make any commercial or practical sense. **The words "shall be at liberty to do so" be subsisted for subparagraph (a) and (b)**

**2.13. Foreclosure****Section 124 (1)**

"Any rule of law, written or unwritten, entitling a mortgagee (lender) to foreclose the equity of redemption in mortgaged land is abolished."

**Shortcomings:**

The Act has decisively abolished the remedy. Instead, it has provided other remedies which were already in existence.

**Recommendations:**

Foreclosure is an important remedy in long-term mortgage arrangements as it allows the lender to **go into ownership** of the property and allow him to effect such changes or improvements thereon as are necessary before selling it at a later or opportune stage. This remedy is sparingly used and is only granted by a court as a last resort remedy. Enforcement of rights under a mortgage including foreclosure are provided for in the Civil Procedure Code, 1966 Order XXXII. As such, Section 124 (1) should be deleted.

Typically, the Act has infringed on procedural aspects which are better handled by procedural **law** such as the Civil Procedural Code 1966, above cited.

**2.14. Remedies of the Lender upon default of the borrower**

**Section 125 (1)**

“Where a borrower is in default of any obligation to pay interest or any other periodic payment or any part thereof due under any mortgage or in the performance or observation of any covenant, express or implied in any mortgage **and continues so to be in default for one month**, the lender may serve on the borrower a notice in writing to pay the money owing or perform and observe the agreement as the case may be.”

**Section 125 (2) (b)**

“The notice required by subsection (1) shall adequately inform the recipient of the following matters:

...(b) where the default consists of the non-payment of any money due under the mortgage, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;...”

**Section 126 (1)**

“The lender may sue for the money secured by the mortgage only in the following cases-

- (a) Where the borrower is personally bound to repay the money;
- (b) Where by any cause other than the wrongful act of the borrower a reasonable opportunity to provide further security sufficient and the borrower has failed to provide that additional security;
- (c) Where the lender is deprived of the whole or part of his security through or in consequence of the wrongful act or default of the borrower.”

### **Section 126 (3)**

“The court may at its discretion order a postponement of any proceedings brought under this section, until the lender has exhausted all his remedies against the mortgaged land, unless the lender agrees to the discharge the mortgage.”

- Shortcomings:**
- (i) The duration and replication of notices were observed to have serious consequences to lenders
  - (ii) Specifically the following provisions were identified as creating operational problems:

### **Section 125 (1)**

Committee members were agreed that once a borrower defaults, there is no rationale in forcing the lender to wait for one month before being able to serve notice to the borrower to pay money owed or to perform or observe the terms and conditions of agreement as the case may be.

Therefore it is proposed that, the words “ **and continues so to be in default for one month**” highlighted in bold should be deleted from **Section 125 (1)**.

### **Sections 125 (2) (b)**

**Section 125 (3)** reads as follows:

“Where the borrower does not comply within two months of the date of service with the notice served on him under subsection (1), the lender may-

- (a) Sue the borrower for the monies due ...”

**Recommendations:** In order to maintain consistency with **Section 125 (3)** above, it is proposed that the period to rectify a default under **Section 125 (2) (b)** should be **two months** and not three months as is currently the case.

### **Section 126 (1) and (3)**

- It was agreed that the grounds upon which the lender may sue for money secured by the mortgage should not be prescribed by statute as these grounds are normally stipulated in the mortgage instrument or loan agreement. **Sections 126 (1) and (3)** are also very restrictive on the grounds upon which the lender may sue.
- For this reason it recommended that the whole of **Sections 126 (1) and (3)** be deleted and **Section 126 (2)** should stand on its own as **Section 126**.

## 2.15. Appointment, Powers, Remuneration and Duties of a Receiver

### Section 127(2) reads as follows:

“Prior to the appointment of a receiver under this section, the lender shall serve a notice in the prescribed form on the borrower and shall not proceed with the said appointment until thirty days have lapsed from the date of the service of that notice”.

#### Shortcomings:

Since it has been recommended that amendment be made with regard to notices provided under Section 125, there is no need to provide for further notices for the appointment of Receiver as prescribed in Section 127(2).

#### Recommendations:

The provision of S.125 forces the lender to follow a very long process of pushing the borrower to comply with the terms and conditions contained both, in the mortgage instrument and the loan agreement. This Section further provides for a variety of options that the Lender can take in the event of a prolonged default by the Borrower. Serving of notice to the Borrower has also been provided under this Section. For this reason, there is no need to further provide an extra notice for the appointment of a Receiver as ordained under S. 127(2).

It has, therefore, been recommended that S.127 (2) be deleted.

## 2.16. Lenders Power of Leasing

### Section 128 (2)

“Prior to granting a lease under this section, a lender shall serve a notice on the borrower in the prescribed form and shall not proceed with the granting or execution of that lease until 30 days have elapsed from the service of that notice.”

#### Shortcomings:

The reasons ascribed to amendment of Section 125 also apply in this section.

#### Recommendation:

Delete the words “and shall proceed ..... that notice”.

## 2.17. Lender's Power of Sale

### Section 131 (2)

"Before exercising the power to sell the mortgaged land, the lender shall serve a notice to sell in the prescribed form on the borrower and shall not proceed to complete any contract for the sell of the mortgaged land until a period of 40 days have elapsed from the date of the service of that notice to sell."

**Shortcomings:** The reasons ascribed to amendment of Section 125 also apply in this section.

**Recommendation:** The following be deleted "and shall proceed..... that notice".

## 2.18. Retrospective Effect of the Act to Compensation

### Present Law

Section 20 subsection (3) deals with compensation for loss of land which was acquired by foreigners before the new Act become operational.

**Recommendations:** The law should not have a retroactive effect. Such position may be challenged by a court on the basis that the provision is unconstitutional. Accordingly, a rephrasing of the sections is paramount.

## 2.19. Exclusive Jurisdiction

Section 167 of the Act provides for exclusive jurisdiction to the Land Division of the High Court. Land Tribunals, etc. in respect of disputes relating to land matter including mortgages.

**Recommendations:**

- (i) Recognition should be made to other variety of securities provided by bank (debentures, chattel transfer, guarantees and mortgages)
- (ii) It was acceptable under the law to file mortgage cases to the High Court Land Division and other securities cases to the Commercial Court

## Part 111: OTHERS

### 3.1. Administrative Procedures of Land Office and Land Registry

- (i) Section 32 (i) of the Land Act, 1999 empowers the commissioner for Lands to consider and approve dispositions of Land.
- (ii) Regulations of the Land (Dispositions of Rights of Occupancy) Regulations 2001 provide categories of dispositions that require approval under the Act.

**Recommendation:**

The Commissioner for Lands is requested to address this problem by streamlining the administrative process at the Ministry with a view to avoid **unnecessary delay**.

**SUMMARY REPORT OF THE MEETING BETWEEN SENIOR OFFICIALS OF THE MINISTRY OF LANDS AND HUMAN SETTLEMENTS DEVELOPMENT AND THE BANK OF TANZANIA ON PROPOSED REVIEW OF THE LAND ACT, 1999: 14<sup>TH</sup> AND 28<sup>TH</sup> AUGUST 2002**

<b>S/NO</b>	<b>DISCUSSED SECTIONS</b>	<b>TANZANIA BANKERS ASSOCIATION'S RECOMMENDATIONS</b>	<b>MINISTRY OF LANDS AND HUMAN SETTLEMENTS DEVELOPMENT OPINION</b>	<b>CONCLUSION</b>
1.	Creation of a mortgage s.112 (i)	Deletion of Section 112 (l) and be substituted by: - An occupier of land under a right of occupancy and a lease may, by an instrument in the prescribed form mortgage his interest in the land or part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition, and the instrument shall contain a special acknowledgement that the mortgagor understands the terms and effects of the mortgage, and the acknowledgement shall be signed by the mortgagor, or where the mortgagor is a corporation, by the authorized officer/persons attesting the affixation of the common seal.	The subsection need not be deleted, instead the requirement for the borrower to acknowledge understanding the terms and conditions may be included in the Land Forms for Mortgage Deeds, i.e.L.R. Nos. 40,41,42, & 43.	Acknowledgement of the debt where necessary may be included in the Land Forms/ Mortgage Deeds instead of amending the Act. Section 112 is for powers to create a mortgage or who may create a mortgage. The section is not for what should be contained in mortgage instrument.

2.	Marital Consent S. 112 (3)	Subsection 112 (3) should be deleted and there should be a provision to the effect that spouses must register their interest on land upon consummation of marriage for those matrimonial homes where they reside.	<ul style="list-style-type: none"> <li>• Purpose of the subsection is to protect interest of spouses over land, which is matrimonial home. Basically the subsection confirms the position as provided under Section 51 of the Law of Marriage Act, 1971.</li> <li>• Consent by spouse is required only at the time of execution thus avoid intervention by a spouse at the time of realization.</li> </ul>	<ul style="list-style-type: none"> <li>• Valuation reports for dispositions of rights of occupancy should state and reflect whether the property to be mortgaged or otherwise disposed off, is matrimonial home or not.</li> </ul>
3.	Customary and Small Mortgages S.113 &114	There should be no distinction between customary, small mortgages and regular mortgages-Section 113 and 114 should be deleted and instead microfinance legislation be put in place to assist with the facilitation of credit to low income earners.	<ul style="list-style-type: none"> <li>• Categorization and special treatment afforded to small mortgages is intended to cater for the majority low income borrowers and protect them from stringent lending conditionalities that require experienced borrowers.</li> <li>• If at all the Government is keen on ensuring equitable access to land and guaranteeing security of tenure to the majority poor Tanzanians, at the same time ensuring them with credit facility, without exposing them to the risk of mass displacement due to ignorance and mismanagement of the mortgage, then consensus of all stakeholders will be needed on how best can the proposed amendment</li> </ul>	<ul style="list-style-type: none"> <li>• This is a political issue which may be discussed in appropriate political levels and if considered necessary the afforded protection may be removed after revising the National Land Policy of 1995 as reflected under <b>section 3 (1)©, (j) and (k) of the Act.</b></li> <li>• Data is needed on the number of applicants for the small mortgages and customary mortgages whose applications have been turned down because of the new legal position. This to be compared and contrasted with the position before the 1<sup>st</sup></li> </ul>

			of the law be effected.	May 2001 when the new law became operational.
4.	Variation of interest rates on mortgage S.119	<p>It is proposed that the section should read as hereunder; S.119 (1) The rate of interest payable under a loan secured by mortgage may be reduced or increased if covered by a notice serviced on the borrower and the mortgagor by the lender which shall;</p> <p>(a) State clearly and in a manner which can be readily understood, the new rate of interest to be paid in respect of the loan secured by the mortgage etc;</p> <ul style="list-style-type: none"> <li>• Variation of interest rate is only relevant in case of Agreement Spelling “floating rate” and not fixed rate.</li> </ul>	<p>The provision is intended to provide transparency so that the borrower has to be made to understand circumstances that may necessitate variation of interest on the mortgage. The categorization of floating and fixed interest rate may at best be reflected in the Mortgage Deed depending on the agreement of the parties. The provisions of the new law do not prevent such an agreement; the law is all embracing of the two situations. The parties are left with freedom to chose what should govern their agreement. The specifics are left for the will the parties, provided the main principles are safeguarded including the right of the borrower to be heard in case the lender wishes to vary the interest rate.</p>	<ul style="list-style-type: none"> <li>• Parties (the lender and the borrower) have a duty to make sure that the mortgage instrument states clearly whether the mortgage is covered by a floating of fixed interest rate.</li> </ul>
5.	Discharge of Mortgages – Section 120.	<ul style="list-style-type: none"> <li>• It is proposed that the whole Section 120 be deleted and replaced by;</li> <li>(1) If the borrower or the mortgagor at any time shall pay to the lender/mortgagee the secured liabilities in accordance with the covenants contained in the Loan Agreement and the mortgage Deed, the</li> </ul>	<ul style="list-style-type: none"> <li>• Universally the mortgagor/borrower has an equitable right to redeem his property at any time upon repayment of the advanced money plus interest thereon.</li> <li>• Worldwide the right of the mortgagor to redeem his property upon repayment of the debt is legally recognized.</li> <li>• The Provision is intended to</li> </ul>	<p>The provisions should be retained.</p>

		<p>lender/mortgagee at the request and cost of the mortgagor will duly discharge the mortgage deed;</p> <p>(2) A discharge, whether of the whole or of part of a charge shall be made by an instrument in the prescribed form or (if the whole) the word “discharged” may be endorsed on the charge duplicate or triplicate and the endorsement executed by the Lender/Mortgagee and dated;</p> <p>(3) A discharge shall be completed by the cancellation in the register of the charge, or part thereof as the case may require, following the statement of discharge or endorsement charge.</p>	<p>avoid element of “clogs or fetter” on the right of redemption.</p> <ul style="list-style-type: none"> <li>• Tanzania should not be isolated from other jurisdictions for not recognizing the cardinal rule on the borrower’s right of redemption.</li> <li>• In the process transparency should govern the exercise of the right. <b>Refer: section 3(1)(h) &amp; (l) of the Act.)</b></li> </ul>	
6.	Remedies of the Lender upon default of the borrower and or mortgagor section 125 and 126	<ul style="list-style-type: none"> <li>• The period of notice under section 125 (1) be twenty on (21) days instead of the current wording of the provision which provides for approximately 4 months before exercising power of sale. The period of 4 months is too long as it subjects banks to possible vandalization property.</li> <li>• It is proposed that sub-section 125 (1) should be</li> </ul>	<ul style="list-style-type: none"> <li>• The spirit behind is to make sure that the notice to be served is adequate and reasonable in terms of time for rectification of the alleged default, accessibility to or availability of the targeted borrower, nature of the alleged default and its consequential remedial measures. There is also the necessity to satisfy oneself whether the assumed</li> </ul>	Parties should discuss and compromise on reasonable time limit of the notices

		<p>amended and read to suggest that once default occurs the notice should be issued immediately without providing for blessing thirty days as it reads now.</p> <ul style="list-style-type: none"> <li>• Section 125 (2) (b) should not provide for three (3) months blessing time before payment in default be completed, instead be twenty on (21) days.</li> <li>• Section 126 (1) (a) should not provide for one circumstance that the lender can sue be “where the borrower is personally” bound to repay the money and should read generally that where the borrower has failed to repay the money secured by the mortgage and notice issued pursuant to S.125 has expired.</li> </ul>	<p>default is in realty default or an oversight. A secondary issue is how effective and justifiable is the recommended 21 days period instead of the three months.</p> <ul style="list-style-type: none"> <li>• The provided period for the notices for the exercise of power of sale is the one which has been applying in Tanzania for the past more than seventy years by virtue of the received law (refer; <b>section 20 of the Conveyancing and Law of Property Act, 1881</b>).</li> </ul>	
7.	<b>Appointment, Powers, Remuneration and duties of a Receiver</b>	<ul style="list-style-type: none"> <li>• It is recommended that sub-section 2 of Section 127 be deleted.</li> <li>• Valuers should not be involved in determining the price for sale of mortgage properties upon default.</li> </ul>	<ul style="list-style-type: none"> <li>• The sub-section imposes a legal duty on the receiver to get the best price obtainable in the market. The sub-section guards against misconduct and conspiracy in dealing with the mortgaged property at the time the lender exercises his powers of sale through the receiver he appoints for the purpose.</li> <li>• The sub-section imposes a legal duty on the receiver to get the best price obtainable</li> </ul>	<p>Further consultations are needed. Therefore conclusion should await consultative meeting with other stakeholders e.g. TIC, TBA, CEO’s NGO’s etc.</p>

			<p>in the market. Determination of whether the secured purchase price of the mortgaged property is less than 25% may require expert opinion. The exercise at best may require involvement of real property valuers. These are professionals who are versed with professional skills to assess value of real property.</p> <ul style="list-style-type: none"> <li>• Imposition of duty of care is imperative in order to do justice to the borrower whose agent is appointed by the lender. (refer <b>section 127 (1) &amp; (4) of the Act</b>)</li> </ul>	
8.	<b>Lender's Power of Sale</b>	<ul style="list-style-type: none"> <li>• It is recommended that Section 131 subsection 1 be amended to limit the period of notice to twenty one (21) days thus harmonise with the other provisions in the Act.</li> <li>• It is also recommended that sub-section 3 of Section 131 should restrict notice to the principal borrower and the mortgagor because other parties underlisted in that provision are not group to the contract.</li> </ul>	<ul style="list-style-type: none"> <li>• The provided list of service of notices is not intended for each and every category of mortgage. Instead in the notice will be served upon the category of persons who are relevant or related to that type of land. For instance one need not serve a notice on the Village Council where the land is general land and vice-versa. Thus responsible and /or interested group should be identified in each particular case.</li> <li>• The enlisted category of persons are persons whose interest in the subject land is likely to be affected and</li> </ul>	<ul style="list-style-type: none"> <li>• Like paragraph 7 above, conclusion awaiting the proposed meeting with stakeholders.</li> </ul>

			<p>hence there is a need to be notified so as not to continue dealing with the land as if their interest is still the same after the sale. It is also their opportunity to offer for purchasing the property as a way of protecting and/or sustaining their interest if they can compete in the market for the sale. Other categories are administrative institutions, which are given notice of change of ownership after the sale.</p>	
9.	<b>Exclusive jurisdiction- Section 167</b>	<ul style="list-style-type: none"> <li>It is recommended that the section be amended to the effect that original jurisdiction be vested to the High Court and parties be at liberty to proceed either with Commercial Division or regular Registry.</li> </ul>	<ul style="list-style-type: none"> <li>The spirit behind establishing the High Court Land Division is promotion of efficiency in the delivery of justice in land related disputes. This is consideration of the increasing number of land disputes in normal courts of law which tend to take longer time that expected. (refer; <b>Section 31 (1)(m) of the Act.</b>)</li> </ul>	<ul style="list-style-type: none"> <li>Agreed that High Court-Land Division remains with exclusive jurisdiction but the said Court be ready for operation soon.</li> </ul>

## **APPENDIX 2**

### **TERMS OF REFERENCE FOR THE TECHNICAL COMMITTEE OF LEGAL EXPERTS**

The Consultative Workshop on Land Act No. 4 1999 which took place on 28<sup>th</sup> October, 2002 reached a consensus that in order to promote dialogue process and establish a reconciled position between all stakeholders; it was agreed that a Technical Committee of Legal Experts be established.

The Technical Committee in its deliberations shall be guided by a Summary of Matrix between the Ministry of Lands and Human Settlements Development and the Bank of Tanzania. (Appendix 1)

It was further agreed that issues and sections which are not included in the Matrix but are relevant should also be included, propose amendments and wording thereof when necessary.

The Technical Committee shall: -

- (i) Elect its Chairperson
- (ii) Convene the meeting and produce the report in two weeks time.
- (iii) The stakeholders meeting will then be convened to go through the Technical Committee report in 2 weeks time commencing on Monday, 14<sup>th</sup> November 2002.

## APPENDIX 3

### MEMBERS OF TECHNICAL COMMITTEE OF LEGAL EXPERTS TO REVIEW THE LAND ACT. 1999

<b>Name</b>	<b>Institution</b>	<b>Status</b>
Peter Bakilana	Tanzania Private Sector Foundation	Chairman
Albert Msangi	Ministry of Lands Human Settlement Development	Member
Fidelis Mutakwamilwa	Ministry of Lands Human Settlement Development	Member
Sylvester Sengerema	Ministry of Justice and Constitution AffairsJustice	Member
Serili Dennis	Bank Of Tanzania	Member
Alfred Woiso	CRDB Bank Ltd	Member
Felix Kibodya	National Bank Commerce Ltd.	Member
Nina Eshon	Standard Chartered Bank	Member
Eve Hawa Sinare	Tanzania Private Sector Foundation	Member
Magdalena Rwebangira	Gender Lands Task Force (NGO)	Member
Abdi Kagomba	Tanzania Investment Centre	Member
Albert Malya	Ministry of Lands Human Settlement Development	Member
Simbang'ulile Kivinge	Tanzania Investment Centre	Member
Dunstan Mrutu	Tanzania National Business Council	Secretariat
David Mushendwa	Ministry of Lands Human Settlement Development	Secretariat
Samson Chemponda	Tanzania National Business Council	Secretariat

## RELEVANT SECTIONS OF THE ACT

### **Section 112**

#### **Power to create mortgage**

- (1) **An occupier of land under a right of occupancy and lessee may, by an instrument in the prescribed form, mortgage his interest in the land or a part thereof to secure the payment of an existing or future or a contingent debt or other money or money's worth or the fulfillment of a condition.**
- (2) The power conferred by subsection (1) shall include the power to create second and subsequent mortgages.
- (3) **A mortgage of a matrimonial home, including a customary mortgage of a matrimonial home shall be valid only if –**
  - (a) **any document or form used in applying for such a mortgage is signed by or there is evidence from the document that it has been assented to by the borrower and any spouse of the borrower living in that matrimonial home;**
  - (b) **any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the borrower and any spouse of any borrower living in that matrimonial home.**
- (4) The power conferred by this section shall be exercisable subject to-
  - (a) any prohibition or limitation imposed by this act or any written law;
  - (b) any restriction contained in an instrument creating or affecting the interest in land which is to be the subject of a mortgage.
- (5) In respect of a mortgage other than a mortgage of land registered under the Land Registration Ordinance, it shall take effect only when it is registered in a prescribed register and a lender shall not be entitled to exercise any of his remedies under that mortgage if it is not so registered.
- (6) Nothing in this section shall operate to prevent a borrower from offering and a lender from accepting-
  - (a) a written and witnessed undertaking, the clear intention of which is to charge the borrower's land with the repayment of money or money's worth obtained from the lender; or
  - (b) deposit of any of the following-
    - (i) a certificate of a granted right of occupancy;
    - (ii) a certificate of a customary right of occupancy;
    - (iii) a document of a lease;
    - (iv) other document which may be agreed upon evidencing a right to an interest in land; or
    - (v) other documents which may be agreed upon secure any payments which are referred to in subsection (1).
- (7) The arrangement specified in paragraph (a) of subsection (6) may be referred to as an "informal mortgage" and deposit of documents specified in paragraph (b) of subsection (6) shall be known and referred to as a "lien by deposit of documents."

## **Section 113**

### **Application of this part to customary mortgages**

- (2) The creation and operation of customary mortgages of land shall, subject to the provisions of this section, continue to be in accordance with the customary law applicable to the land in respect of which the customary mortgage is created.
- (3) **Where the lender under a customary mortgage seeks to exercise any customary remedy which involves or may involve the borrower being disposed or permanently deprived of the occupation of the mortgaged land, the lender shall, after using the services to the Village Land Council try and mediate on the application of the proposed or any other remedy, make an application to the Village Land Council for an order authorizing the exercise of that remedy and the Village Land Council shall, in determining whether to authorize the exercise of that remedy be guided by the provisions of sections 138 and 140 applying to small mortgages, whether the amount of the loan under the customary mortgage exceeds the amount that may be lent on a small mortgage or not.**
- (4) **The borrower under a customary mortgage may, after making use of the services of the Village Land Council to try and mediate on the matter with the lender, apply to a Tribunal for the mortgage to be reopened on the ground that the terms of the mortgage are-**
  - (a) **unfair; or**
  - (b) **an unreasonable departure from the normal terms of a customary mortgage applicable in the area where the land is located; or**
  - (c) **disadvantageous to the interests of the dependants of the borrower, and the Tribunal shall, in considering and determining that application, be guided by the provisions of sections 141 and 142.**
- (5) **In any case concerning a customary mortgage, the Tribunal that-**
  - (a) **there is a *lacuna* in the customary law applying to that mortgage; and**
  - (b) **no other system of customary law makes adequate or any provision for the matter in respect of which there is a lacuna, be guided by the relevant provisions of this Part of this Act.**

**Section 114**  
**Small mortgages**

- (9) In this Act, a ‘small mortgage’ is a mortgage for a period not exceeding three years to secure any sum of money not exceeding the sum set out in subsection (2) or which shall from time to time be set by order made by the Minister, after consultation with: -
- (a) the Commissioner;
  - (b) any body or organization whose principal business is to advance or to represent those organizations whose principal business is to advance money on the security of a mortgage.
- (10) The sum of money which may be secured by a small mortgage shall not, unless and until it is altered by order made by the Minister in accordance with subsection (1), be greater than half a million shillings.
- (11) A small mortgage instrument and any other document which is ancillary to, or is to be used by the lender to inform the borrower of all the rights and obligations of the parties to, a small mortgage shall be in such a language and use such clear and simple words, typography and lay out that the borrower is made fully aware-
- (a) of the right and duties conferred or imposed on him by the mortgage or any document ancillary to the mortgage;
  - (b) of the protection and remedies available to him under this Act and any other law applicable to small mortgages;
  - (c) such other matters as may be prescribed.
- (12) It shall be the duty of the lender of monies secured by a small mortgage to give to the borrower and, where the borrower is married, the spouse or spouses of the borrower and any other person who undertakes any obligation under that small mortgage a copy of the mortgage instrument prepared in accordance with the provisions of subsection (3).
- (13) If it appears to the court on an application to it under sections 138 to 142 that the small mortgage does not comply in every particular with the provisions of subsections (3) and (4) and any regulations made under this section which deal with the matters contained in those subsections, the court shall refuse to make the order applied for unless it appears to the court that-
- (a) every person to whom subsection (4) refers received, before the creation of the small mortgage, as full an explanation of the consequences of that mortgage as if those subsections had been complied with; or
  - (b) there are exceptional circumstances which provide a satisfactory explanation of the failure to comply with those subsections.
- (14) Any advance of money which purports to be under a small mortgage but which purports to be under a small mortgage but which exceeds the maximum sum of money which may, under subsection (2) or any order made by the Minister under

subsection (1), from time to time be advance under a small mortgage shall cease to be a small mortgage.

- (15) Any provision, term, covenant or condition in a small mortgage which purports to exclude any provision of this Act which specifically applies to a small mortgage shall be void.
- (16) The Minister may make regulations as to the form, content and lay out of small mortgages and where such regulations set out model form complying with subsection person or organization advancing money on a small mortgage shall, be under a duty to use documents in connection with their small mortgage no less clear and comprehensive than that model form.**

## **Section 119**

### **Variation of a mortgage**

- (1) The rate of interest payable under a mortgage may be reduced or increased by a notice served on the borrower by the lender which shall-**

  - (a) give the borrower a written notice of not less than thirty days of the reduction or increase in the rate of interest;**
  - (b) state clearly and in a manner which can be readily understood, the new rate of interest to be paid in respect of the mortgage.**
  
- (2) The amount secured by a mortgage may be reduced or increased by a memorandum which-

  - (a) complies with subsection (5); and
  - (b) is signed-
    - (j) in the case of a memorandum of reduction by the lender; or
    - (ii) in the case of a memorandum of increase, by the current borrower; and
  - (c) states that the principal moneys intended to be secured by the mortgage are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.
  
- (3) The term or currency of a mortgage may be shortened, extended or renewed by a memorandum which: -

  - (a) complies with subsection (5); and
  - (b) is signed by the current borrower and by the lender; and
  - (c) states that the term or currency of the mortgage is shortened, extended or renewed, as the case may be, to the date or in the manner specified in the memorandum.
  
- (4) The covenants, conditions and powers expressed or implied in a mortgage are varied in the manner specified in the memorandum.
  
- (5) A memorandum for the purposes of subsections (2), (3) and (4)-

  - (a) must be endorsed on or annexed to the mortgage instrument; and
  - (b) when so endorsed or annexed to the mortgage instrument, operates to vary the mortgage in accordance with the terms of the memorandum.

**Section 120**  
**Right to discharge**

- (1) Subject to the provisions of this section, of payment of all money and the performance of all other conditions and obligations secured by the mortgage the borrower shall be entitled to discharge the mortgage at any time before the mortgaged land has been sold by the lender or a receiver under a power of sale and any agreement or provision in the mortgage instrument or otherwise which-
  - (a) purports to deprive the borrower of this right; or
  - (b) seeks to fetter the exercise for this right; or
  - (c) stipulates for a collateral advantage which is unfair and unconscionable and inconsistent with the right to discharge, shall be void.
  
- (2) **The lender may provide in the mortgage instrument that where a borrower wishes to exercise his right to discharge the mortgage at any time before the expiry of the term of the mortgage-**
  - (a) **he shall give one month's notice of his intention to discharge; or**
  - (b) **he shall pay not more than one month's interest at the rate at which interest is payable on the principal sum secured by the mortgage or at any lesser rate which may be agreed, as well as paying all other monies secured by the mortgage.**
  
- (3) A discharge whether of the whole or a part of a mortgage shall be as prescribed under this Act or any other law.
  
- (4) Section 63 of the Land Registration Ordinance, Cap. 334 shall apply to any mortgage made under this Part.

## Section 125

### Remedies of the lender

- (1) **Where a borrower is in default of any obligation to pay interest or any other periodic payment or any part thereof due under any mortgage or in the performance or observation of any covenant, express or implied in any mortgage and continues so to be in default for one month, the lender may serve on the borrower a notice in writing to pay the money owing or to perform and observe the agreement as the case may be**
- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters-
  - (a) the nature and extent of the default made by the borrower;
  - (b) **where the default consists of the non-payment of any money due under the mortgage, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**
  - (c) where the default consists of the failure to perform or observe any covenant, express or implied, in the mortgage, the thing the borrower must do or desist from doing as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
  - (d) the consequence that if the default is not rectified within the time specified in the notice, the lender will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provide for in this Sub-Part;
  - (e) the right of the borrower in respect of certain remedies to apply to the court for relief against those remedies.
- (3) **Where the borrower does not comply within two months of the date of service, with the notice served on him under subsection (1), the lender may-**
  - (a) **sue the borrower for any monies due and owing under the mortgage;**
  - (b) where the mortgage is not a small mortgage-
    - (i) appoint a receiver of the income of the mortgaged land;
    - (ii) lease the mortgaged land or where the mortgage is of a lease, sublease the land;
    - (iii) enter into possession of the mortgaged land;
    - (iv) sell the mortgaged land;
  - (c) where the mortgage is a small mortgage, apply to the court for an order-
    - (i) to appoint a receiver of the income of the mortgaged land;
    - (ii) to lease the mortgaged land or where the mortgage is of a lease, sublease the land;
    - (iii) to enter into possession of the mortgaged land;

- (d) where the mortgage is a mortgage of land held for a customary; right of occupancy,
  - (i) appoint a receiver of the income of the mortgaged land;
  - (ii) apply to the court for an order-
    - (aa) lease the mortgaged land or where the mortgages is of a lease, sublease the land;
    - (bb) enter into possession of the mortgaged land;
    - (cc) sell the mortgaged land to any person or group of persons referred to in section 30 of the Village land Act, 1999.
- (4) The Minister shall, by regulations, prescribe the form and content of a notice to be served under this section and where the notice to be served under this section has been so prescribed, a notice served under subsection (1) shall be in that form and shall be void if it is not in that form.

## **Section 126**

### **Lender' action for money secured by mortgage**

- (1) **The lender may sue for the money secured by the mortgage only in the following cases-**
  - (a) **where the borrower is personally bound to repay the money;**
  - (b) **where by any cause other than the wrongful act of the borrower or lender the security is rendered insufficient and the lender has given the borrower a reasonable opportunity to provide further security sufficient and the borrower has failed to provide that additional security;**
  - (c) **where the lender is deprived of the whole or part of his security through or in consequence of the wrongful act or default of the borrower.**
- (2) No action shall be commenced until the time for complying with a notice served under section 125 has expired.
- (3) **The court may at its discretion order a postponement of any proceedings brought under this section, until the lender has exhausted all his other remedies against the mortgaged land, unless the lender agrees to discharge the mortgage.**

## **Section 127**

### **Appointment powers, remuneration and duties of receiver**

- (1) It shall be an implied condition in every mortgage, other than a small mortgage that the lender shall have the power to appoint a receiver of the income of the mortgaged land.
- (2) **Prior to the appointment of a receiver under this section, the lender shall serve a notice in the prescribed form on the borrower and shall not proceed with the said appointment until thirty days have elapsed from the date of the service of that notice.**
- (3) The appointment of a receiver shall be in writing signed by the lender.
- (4) **A receiver may be removed at any time and a new receiver appointed by writing signed by the lender.**
- (6) A receiver appointed under this section shall be deemed to be the agent of the borrower for the purposes for which he is appointed, and the borrower shall, unless the mortgage instrument provides otherwise, be solely responsible for the acts and defaults of the receiver.
- (7) Where a court approves the appointment of a receiver under a small mortgage, it may order that the lender be jointly responsible with the borrower for the acts and defaults of the receiver.
- (8) The receiver shall have the power to demand and recover all the income of which he is appointed receiver, by action or otherwise, in the name of the borrower, and to give effectual receipts for the same.
- (9) The receiver shall be entitled to retain out of any money received by him all costs, charges and expenses incurred by him as receiver, and, for his remuneration, a commission at the rate, not exceeding five per centum of the gross amount of all monies received, specified in the appointment, or if no rate is so specified at the rate of five per centum or any other rate as the borrower and lender may agree or where the appointment of a receiver comes before the court, which the court thinks fit.
- (10) The receiver shall apply all moneys received by him in the following order of priority-
  - (a) first, in the payment of all rents, rates, charges taxes and other outgoings required to be paid in respect of the mortgaged property;
  - (b) second, in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage of which he is the receiver;
  - (c) third, in payment of his remuneration and expenses;

- (d) fourth, in payment of all reasonable expenses incurred in the doing of anything which a receiver is required or entitled to do in respect of the mortgaged land, including but not limited to-
  - (i) the payment of any premiums on any insurance policy properly payable under the mortgage instrument; and
  - (ii) the costs of undertaking necessary and proper repairs to any buildings comprised in the mortgaged land as directed in writing by the lender;
- (e) fifth, in the repayment of any money paid or advanced by the lender to meet the reasonable expenses referred to in paragraphs (a), (b), (c) and (d) together with any interest on any amount so paid or advanced at the rate at which interest is payable on the principal sum secured by the mortgage;
- (f) sixth, in payment of the interest accruing due in respect of any principal sum secured by the mortgage;
- (g) seventh, in and towards the discharge of the principal sum secured by the mortgage, and shall pay the residue, if any, to the borrower or other person entitled to the mortgaged land.

## Section 128

### Lender's power of leasing

- (1) A lender who has appointed a receiver under section 127, shall, unless the mortgage instrument expressly provides to the contrary, have power, subject to the provisions of this Act and any other laws applicable to the leases of land-
  - (a) to grant leases in respect of the mortgaged land or any part thereof;
  - (b) accept a surrender of any lease so granted and of any lease granted by the to borrower, and may, for that purpose, execute,, in place of the borrower any instrument required to execute that lease or surrender.
- (2) **Prior to granting a lease under this section, a lender shall serve a notice on the borrower in the prescribed form and shall not proceed with the granting or execution of that lease until thirty days have elapsed from the service of that notice.**
- (3) Every lease granted by the lender shall-
  - (a) be made to take effect in possession not later than six months after its date;
  - (b) reserve the best rent that can reasonably be obtained regard being had to the circumstances of the case;
  - (c) subject to the provisions of paragraph (a) of subsection (5), be for a term not exceeding fifteen years or the length of the term of the mortgage whichever is the shorter;
  - (d) contain any terms and conditions which are reasonable, having regard to the interests of the borrower and of any other persons having an interest in the mortgaged land;
  - (e) contain a declaration that the lender has appointed a receiver, with the date of the appointment.
- (4) A lease created by a lender under this section shall not be binding on any person holding, and shall not take priority over, any mortgage which has priority to the mortgage of the lender who has granted the lease
- (5) **Where money has been advanced on the security of a small mortgage, a lease creaed out of that mortgaged land shall-**
  - (a) be for a term not exceeding two years;**
  - (b) in the case of-**
    - (i) land used for agricultural purposes, ensure that the borrower is left in possession of sufficient land and buildings to enable him to provide basic shelter and sustenance for himself and his dependants living with him; and**

**(ii) dwelling house, ensure that the borrower is left sufficient space in that dwelling house or is provided with alternative accommodation to enable him to provide basic shelter for himself and his dependants living with him.**

- (6) A lease of mortgaged village land held by a villager for a customary right of occupancy shall comply with the provisions of paragraphs (a) and (b) of subsection (5).

**Section 131**  
**Lender's Power of Sale.**

- (1) Where a borrower is in default of his obligations under a mortgage and remains in default at the expiry of the time provided for the rectification of that default in the notice served on him under subsection (1) of section 125, a lender may exercise his power to sell the mortgaged land.
- (2) **Before exercising the power to sell the mortgaged land, the lender shall serve a notice to sell in the prescribed form on the borrower.**
- (3) A copy of the notice to sell served in accordance with subsection (2) shall be served on-
  - (a) the Commissioner where the mortgaged land is held for a graded right of occupancy;
  - (b) the Village Council of the village where the mortgaged land is located where that land is held for a customary right of occupancy or is held under customary tenure;
  - (c) where the mortgaged land is a lease, the holder of the right of occupancy out of which the lease has been granted;
  - (d) any spouse of the borrower
  - (e) any lessee and sublessee of the mortgaged land or of any buildings on the mortgaged land;
  - (f) any person who is a co-occupier with the borrower;
  - (g) any other lender of moneys secured by a mortgage on the mortgaged land of whom the lender proposing to exercise the power of sale has actual notice;
  - (h) any guarantor of the moneys advanced under the mortgage;
  - (i) any other person with a right to enter on and use the land or the natural resources in, on, or under the mortgage;
  - (j) Such other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the mortgaged land.
- (4) The exercise by a lender of this power of sale shall be a disposition which is subject to the provisions of section 38.

## **Section 167**

### **Exclusive jurisdiction**

- (1) **The following courts are hereby vested with exclusive jurisdiction, subject to the provisions of this Part, to hear and determine all manner of disputes, actions and proceedings concerning land, that is to say-**

  - (a) the Court of Appeal;**
  - (b) the Land Division of the High Court established in accordance with law for time being in force for establishing courts divisions;**
  - (c) The District Land and Housing Tribunals;**
  - (d) Ward Tribunals;**
  - (e) Village Land Councils;**
- (2) **Notwithstanding subsection (1), the Ward Tribunals established under the Ward Tribunal Act, 1985, shall have jurisdiction in relation to the area of a District Council for the purposes of this Act and shall be competent Courts as are or may be established by a written law for the time being relating to the establishment and powers of magistrates and other courts of mainland Tanzania.**
- (3) **A person aggrieved by a decision of a Ward Tribunal may appeal to the court of law having jurisdiction of the subject matter in the area of the relevant District Council.**

## Section 19

### Right to occupy land

- (1) The right to occupy land which a citizen, a group of two or more citizens whether formed together in an association under this Act or any other law or not, a partnership or a corporate body, in this Act called “right holders” may enjoy under this Act are hereby declared to be-
  - (a) a granted right of occupancy;
  - (b) a right derivative of a granted right of occupancy, in this Act is called a derivative right.
  
- (2) **A person or a group of persons whether formed into a corporate body under the Companies Ordinance or otherwise who is or are non-citizens, including a corporate body the majority of whose shareholders or owners are non-citizens may only obtain a right of occupancy or derivative right for purpose of investment prescribed under the Tanzania Investment Act, 1977.**

## **Section 20**

### **Occupation of land by non-citizen restricted**

- (1) For avoidance of doubt, a non-citizen shall not be allocated or granted land unless it is for investment purposes under the Tanzania Investment Act, 1977**
- (2) Land to be designated for investment purposes under subsection (1) of this section shall be identified, gazetted and allocated to the Tanzania Investment Center which shall create derivative rights to investors.**
- (3) Subject to Section 37 (8), all lands acquired prior to the enactment of this Act shall be deemed to have no value, save for unexhausted imponents for which compensation may be paid under this Act or any other law.**
- (4) For the purposes of this Act, any body corporate of whose majority shareholders or owners are non-citizens shall be deemed to be non-citizen or foreign company.**
- (5) At the expiry, termination or extinction of the right of occupancy or derivate right granted to a non-citizen or a foreign company, reversion of interests or rights in and over the land shall vest in the Tanzania Investment Center or any other authority as the Minister may prescribe in the *Gazette*.**

**Section 25**  
**Procedure for application for right of occupancy**

- (1) An application for a right of occupancy shall be-
  - a. submitted on a prescribed form and accompanied by a photograph;
  - b. accompanied by the prescribed fee;
  - c. signed by the applicant or a duly authorized representative or agent of the applicant;
  - d. sent or delivered to the Commissioner or an authorized officer;
  - e. contain or be accompanied by any information which may be prescribed or which the Commissioner may in writing require the applicant to supply;
  - f. accompanied by a declaration in the prescribed form of all rights and interests in land in Tanzania which the applicant has at the time of the application;
  - g. where any law requires the consent of any local authority or other body before an application for a right of occupancy may be submitted to the Commissioner, accompanied by a document of consent, signed by the duly authorized officer of that local authority or other body;
  - h. if made by a non-citizen or foreign company accompanied by a certificate of Approval granted by the Tanzania Investment Center under the Tanzania Investment Act, 1997 and any other documentation which may be prescribed by that Act, this Act or any other law.
  - i. If an application for a right of occupancy or derivative right, which is made by non-citizen or a foreign company, is for residential purposes, the use of such land shall be secondary or ancillary to the investment approved under the Tanzania Investment Act;
- (2) The Commissioner may require an applicant to submit information relevant to that application, additional to that already submitted with the application, and shall not be obliged to determine the application until that additional information has been submitted or a satisfactory explanation provided as to why it is not practical or possible to submit that additional information.
- (3) Where an application is for a right of occupancy in reserved land, the Commissioner shall refer that application to the official or the public body having jurisdiction over that reserved land and shall take account of any representations that such official or such public body shall make on that application.
- (4) Where an application if for a right of occupancy the development of which in accordance with the application will have, in the opinion of the Commissioner, a substantial effect on the activities and services provided by the local authority in the area where the land the subject of the right of occupancy is situate, the Commissioner shall refer that application to that local authority and shall take

account of any representations made by that local authority on that application.

- (5) Any official to whom or public body or local authority to which an application is referred under subsections (3) or (4) may make any such representations on that application within twenty days of the receipt of that application.
- (6) The Commissioner shall maintain register of applications the prescribed form which shall be available to inspection by the members of the public at reasonable times during office hours.

## **Section 124**

### **Foreclosure abolished**

- (1) **Any rule of law, written or unwritten, entitling a mortgage (lender) to foreclose the equity of redemption in mortgage land is abolished.**
- (2) It is hereby declared that on and after the coming into operation of this Act, a lender shall not be entitled to enter into possession of the mortgaged land held for a right of occupancy or a mortgaged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the mortgage, other than in accordance with the provisions of this Sub-Part.

## **Section 132**

### **Duty of lender exercising power of sale**

- (1) A lender who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the borrower, any guarantor of the whole or any part of the sums advanced to the borrower, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) **Where the price at which the mortgaged land is sold is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the lender is in breach of the duty imposed by subsection (1) and the borrower whose mortgaged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of mortgaged land is sold by the lender at an undervalue being less than twenty five per centum below the market price shall not be taken to mean that the lender has complied with the duty imposed by subsection (1).**
- (3) It shall not be a defense to a proceeding against a lender for breach of the duty imposed by subsection (1) that the lender was acting as agent of or under a power of attorney from the borrower or any former borrower.
- (4) A lender shall not be entitled to any compensation or indemnity from the borrower, any former borrower or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).
- (5) The sale by a prescribed lender of any village land occupied by a villager shall conform to the provisions of sections 30 and 31 of the Village Land Act, 1999, save that such a sale shall not require any approval from a village council.
- (6) Any attempt by a lender to exclude all or any of the provisions of this section in any mortgage instrument or any agreement collateral to a mortgage or in any other way shall be void.

## **Section 111**

### **Application of this Part to mortgages**

- (1) **This Part applies to all mortgages of land or interests in land, made or coming into effect before on and after the coming into operation of this Act and any other mortgages of land which are specifically referred to in any section in this Part and references to mortgages in this Part shall apply and apply only to mortgages of land and interests in land.**
- (2) References to a mortgage in this Part include, unless it is stated otherwise or the context makes plain that it is otherwise, a small mortgage.
- (3) References in this Part to “the mortgaged land” shall be taken to mean and include a mortgaged right of occupancy, a mortgaged lease and sublease and a second or subsequent mortgage.

**Section 117**  
**Tacking**

- (1) A lender may, subject to the provisions of this section, make provision in the mortgage instrument to give further advances or to give credit to the borrower on a current or continuing account.
- (2) A further advance referred to in subsection (1) shall not rank in priority to any subsequent mortgage unless-
  - (a) the provision for further advances is noted in the register in which the mortgage is registered; or
  - (b) the subsequent lender has consented in writing to the priority of the further advance.
- (3) Subsections (1) and (2) shall not apply to a small mortgage.
- (4) Except as provided for in this section there is no right to tack
- (5) Where a mortgage provides for the payment for a principal sum by way of installments, the payment of those installments shall not be taken to be a further advance.

## **Section 138**

### **Remedies in connection with small mortgage**

- (1) **Where, in any case a borrower under a small mortgage remains in default after the end of the period set out in any notice served on that borrower by the lender under section 125, and the lender, at the end of that period, decided to exercise any of the remedies provided for under sections 127 to 133, the lender may proceed only by making an application to a court for an order authorizing him to exercise the remedy or remedies applied for.**
  - (2) Where a lender makes an application to a court under subsection (1), he shall serve a notice in the prescribed form on-
    - (e) the borrower;
    - (f) any spouse of the borrower;
    - (g) any person with whom the borrower jointly mortgaged the land to the lender;
    - (h) any person with a prior mortgage or encumbrance on the mortgaged land of whom he has actual notice, informing those person of the application and the remedy being applied for.
  - (3) **In determining whether to authorize the remedy, a court shall comply with the provisions of sections 140 and 141.**
- (5) A lender shall take no action in connection with any remedy or otherwise against the borrower unless the court has issued an order authorizing the exercise of the remedy applied for.

## Section 140

### Power of the court in respect of remedies and relief thereto

- (1) In considering whether to make an order under section 138 authorizing a lender to exercise any remedy referred to in paragraphs (a) or (c) of subsection (3) of section 125 in respect of a small mortgage or to grant relief against any of the remedies of the lender in relation to a mortgage, other than a small mortgage in respect of which an application for relief has been made, a court-
  - (a) shall, where the mortgaged land consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of or lease the land or a part therefore, have regard to whether the remedy which the lender proposes to exercise is reasonably necessary to prevent any or any further reduction in the value of the mortgaged land or to reverse any such reduction as has already occurred;
  - (b) shall, where the mortgaged land consists or includes a dwelling-house, and the remedy proposed is to appoint a receiver, or take possession or lease the dwelling house or a part of it, have regard to the effect that the appointment of a receiver or the taking of possession or leasing the whole or a part of the dwelling house would have on the occupation of the dwelling house by the borrower and his dependants and if the effect would be to impose undue disturbance on those occupiers, whether it is satisfied that-
    - (i) the lender has made all reasonable efforts, including the use of other remedies available to him, to induce the borrower to comply with his obligations under the mortgage; and
    - (ii) the borrower has persistently been in default of his obligations under the mortgage; and
    - (iii) where the sale is of land held for a customary right of occupancy, the lender has had regard to the age, means, and circumstance including the health and number of dependants of the borrower, and in particular whether-
      - (cc) the borrower will be rendered landless or homeless;
      - (dd) the borrower will have any alternative means of providing for himself and his dependants;
  - (iv) it is necessary to sell the mortgaged land in order to enable the lender to recover the moneys owing to him under the mortgage;
  - (v) in all the circumstances, it is reasonable to approve, or as the case may be, to make the order to sell the mortgaged land
- (2) A court may refuse to authorize an order or may grant any relief against the operation of a remedy which the circumstances of the case require and without limiting the generality of those powers, may-
  - (e) cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;

- (f) extend the period of time for compliance by the borrower with a notice served under section 125;
  - (g) substitute a different remedy or the one applied for or proposed by the lender or a different time for taking or desisting from taking any action specified by the lesser in a notice served under section 113;
  - (h) authorize or approve the remedy applied for or proposed by the lender, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that-
    - (i) the borrower or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and
    - (ii) no injustice will be done by authorizing or approving the remedy, and may authorize or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the court thinks fit.
- (3) Where under the terms of a mortgage, the borrower is entitled or is to be permitted to pay the principal sum secured by the mortgage by installments or otherwise to defer payment of it in whole or in part but provision is also made in the mortgage instrument or any collateral agreement for earlier payment of the whole sum in the event of any default by the borrower or of a demand by the lender or otherwise, then for purposes of this section the court may treat as due under the mortgage in respect of the principal sum secured and of interest on it only the amounts which the borrower would have expected to be required to pay if there has been no such provision for earlier payment.
- (4) A court must refuse to authorize or approve a remedy if it appears to the court that-
- (e) the default in issue has been remedied;
  - (f) the threat to the security has been removed;
  - (g) the borrower has taken the steps which he was required to take by the notice served on him under section 125;
  - (h) the lender has taken or attempted to take some action against the borrower in contravention of subsection (4) of section 138.

**Section 139**  
**Application for relief by borrower**

- (1) An application of relief against the exercise by the lender of any of the remedies referred to in paragraphs (a) and (b) of subsection (3) of section 125 may be made by-
  - (a) the borrower;
  - (b) if two or more persons are joint borrowers, by one or more of them on their own behalf;
  - (c) a spouse of the borrower;
  - (d) a lessee of the borrower;
  - (e) the trustee in bankruptcy of the borrower.
- (2) If an application made in accordance with paragraph (b) of subsection (1) is not made by all the joint borrowers, then, unless the court orders otherwise, it must be served on all the joint borrowers.
- (3) An application for relief may be made at any time after the service of a notice under subsection (2) of section 125, or subsection (2) of section 128, or subsection (1) of section 129 or subsection (2) of section 131, or during the exercise of any of the remedies referred to in those sections.
- (4) An application for relief is not to be taken as an admission by the borrower or any other person applying for relief that-
  - (a) there has been a breach of a covenant of the mortgage by the borrower;
  - (b) by reason of such a breach, the lender has the right to exercise the remedy in respect of which the application for relief has been made;
  - (c) all notices which were required to be served by the lender were properly served;
  - (d) the period for remedying the breach specified in the notice served under section 125 was reasonable or had expired, and the court may grant relief without determining all or any of those matters.

## Section 141

- (1) The court may reopen
  - (d) a small mortgage; or
  - (e) a mortgage for a sum equal to or less than the amount that maybe lent on the security of a small mortgage; or
  - (f) a mortgage of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties.
  
- (2) The Court may reopen a mortgage to which subsection (1) refers if it appears to the Court-
  - (f) that principles of fair dealing were contravened when the terms of the mortgage were agreed to;**
  - (g) that the effect of the terms of the mortgage, at the time when the question of reopening it arises, is to give the lender rights substantially greater than or different from those necessary to ensure that the mortgaged land provides adequate security for the principal sum advanced on the security of that land;**
  - (h) that the mortgage requires payments to be made that are exorbitant or illegal, whether such payments are of interest or capital or both or otherwise and whether such payments are required to be made unconditionally or otherwise;**
  - (i) that the mortgage includes a term which postpones that right to discharge the mortgage or otherwise impedes the discharge of the mortgage which appears to contravene the provisions of subsection (1) of section 116;**
  - (j) that the mortgage imposes terms on the borrower that are significantly disadvantageous to the borrower compared to terms imposed on other borrowers in respect of similar mortgages and that these terms have been imposed solely or mainly because of the gender of the borrower.**

## Section 142

(1) The Court may exercise the powers conferred on it by section 141 either-

on an application made to it for that purpose by either the borrower or the lender; or  
on an application by the lender:-

- (i) to enforce the mortgage; or
- (ii) to commence an action under section 126; or
- (iii) to obtain an order authorizing the exercise of a remedy in connection with a default by the borrower under a small mortgage; or
  - © on an application by the borrower for relief against the exercise by the lender of any remedy in connection with a default by the borrower under a mortgage;

by the Commissioner in respect

- (i) mortgages provided by one or more specific lenders where there is prima facie evidence of a pattern of unfair dealing and practices by the lender or those lenders; or
- (ii) a lender, being a corporate body, which appears to exercise discrimination against borrowers on account of their gender, whether by granting mortgages on terms to which paragraph (e) of subsection (2) of section 141 applies, or by refusing to grant mortgages to persons on account of their gender except that a lender, being a corporate body which is implementing any programme, approved or assisted by the Government, designed to assist women to improve their economic and social position by providing them with advances secured by a mortgage of land shall not be taken to be acting in discriminatory manner if the advances under that programme are made only to women.

(2) In reopening the mortgage, the court may-

- (e) direct that the mortgage shall have effect subject to modifications which the court shall order;
- (f) require the lender to repay the whole or part of any sum paid under the mortgage or any related or collateral agreement by the borrower or any guarantor or other person who assumed an obligation under the mortgage whether it is paid to the lender or any other person;
- (g) require the lender to pay any compensation to the borrower which the court shall think fit;**
- (h) direct the lender, being a corporate body to cease acting in a discriminatory manner with respect to the granting of mortgages.**

(3) In considering whether to exercise the powers conferred it by this section, the court shall have regard to-

where the borrower is an individual, the age, gender, experience, understanding of commercial transaction, and health of the borrower at the time when the mortgage was created.

the financial standing and resources of the borrower relative to those of the lender at the time of the creation of the mortgage;

the degree to which, at the time of the creation of the mortgage, the borrower was under financial pressure and the nature of that pressure;

the interest rates prevailing at the time of the creation of the mortgage and during the continuation of the mortgage and the relationship of those interest rates to the interest rate applying from time to time in the mortgage;

the degree of risk accepted by the lender, having regard to the value of the mortgaged land and the financial standing and other resources of the borrower;

- n) the importance of not undermining the confidence of reputable lenders in the market for mortgages;
- ) any other factors which the court considers relevant.